

The doctrine applies with even greater force in criminal litigation, where “its role in assuring the proper functioning of the criminal justice system is even more vital,” since “[t]he interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case.” United States v. Nobles, 422 U.S. 225, 238 (1975).^{34/} The doctrine also applies with equal force to work product that is shared among attorneys having a common interest, including government and private attorneys.^{35/}

This Court addressed work product waiver in the AT&T case. The question was whether MCI had waived its attorney work product rights to documents that had been prepared by MCI during the course of its prosecution of a civil antitrust suit against AT&T and then shared with the government in a different case brought by the government against AT&T. AT&T then sought those documents from the government. The Court reviewed the case law and noted that the more modern cases tended to hold that “despite voluntary disclosure of the documents to persons not on the same side of the litigation, the privilege remained intact.” 642 F.2d at 1298. The Court explained that “the work product privilege does not exist to protect a confidential relationship, but rather to promote the adversary system by safeguarding the fruits of an attorney’s trial preparations from the discovery attempts of the opponent.” Id. at 1299. Thus, while “[t]he existence of common interests between transferor and transferee is relevant to

Governing Lawyers § 136 & cmt h (anticipation of litigation includes “a proceeding such as a grand jury . . . or an investigative legislative hearing”).

^{34/} The Supreme Court in Nobles recognized that the work product doctrine applies to the “files of the prosecution” even though the government plainly does not risk sanction or imprisonment in a criminal case. 422 U.S. at 238 & n.12.

^{35/} See, e.g., AT&T, 642 F.2d at 1300; Castle v. Sangamo Weston, Inc., 744 F.2d 1464, 1466-67 (11th Cir. 1984) ; In re Sunrise Sec. Litig., 130 F.R.D. 560, 583 (E.D. Pa. 1989).